85-1749

FILED
NOV 2 1985
JOSEPH F. SPANIOL, JR.
CLERK

in the Supreme Court of the United States

October Term, 1984

JOHN HARTSEL and
PATRICK MURRAY (a/k/a JAMES MURPHEY),

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

In a federal multi-count indictment tried via multiple joint criminal jury trials of seven defendants (an 8th defendant died in the interim):

Question 1.

WAS THE WARRANTLESS ARREST BY LOCAL POLICE OF MURRAY MADE WITHOUT PROBABLE CAUSE, SO THAT REGARDLESS OF PURPORTED "CONSENT TO SEARCH" SUPPRESSION SHOULD HAVE BEEN ORDERED AND EVIDENCE EXCLUDED UNDER THE 4th, 5th AND 14th AMENDMENTS?

Question 2.

WERE THE WARRANTLESS STOP, ARREST, DETENTION, SEIZURE IN LAKE PONTCHARTRAIN AND THEN THE PERVASIVE SEARCH OF THE *M/V FORTY* DOCKSIDE BY LOCAL POLICE EACH UNCONSTITUTIONAL, AND NOT PROTECTED BY BROAD CUSTOMS OR COAST GUARD AUTHORITY CONTAINED IN SUCH STATUTES AS 19 U.S.C. §1581 (a) OR BECAUSE OF EXIGENT CIRCUMSTANCES, AND SO CONTRARY TO THE 4th, 5th AND 14th AMENDMENTS?

Question 3.

WITHIN THE STRICTURES OF THE 5th, 6th AND 14th AMENDMENTS, WAS THE EVIDENCE INSUFFICIENT TO SUSTAIN A CONVICTION OF CONSPIRACY TO POSSESS, CONSPIRACY TO IMPORT, OF POSSESSION WITH INTENT TO DISTRIBUTE OR TO IMPORT MARIJUANA?

PARTIES

In the trial court, the U.S. was the prosecution, defendants tried were Charles McGill, John Hartsel, Patrick Murray (a/k/a James Murphey), Arthur Desroches, Cori Desroches, Vernon Holt and Gary Merritt; Cori Desroches and Gary Merritt were acquitted. The Louisiana State Police were involved with the arrests, searches, seizures and interrogations which were the subject of the proceedings below and U.S. Customs briefly.

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REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS BY THE COURT BELOW

The report of the opinions below is at a June 29, 1984, slip opinion; it has not yet been reported in F.2d. Under date of August 29, 1984, a denial of several motions for rehearing appeared, which corrected the initial opinion; it has not yet been reported.

CONCISE STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THE U.S. SUPREME COURT IS BASED

Petitioners suggest that jurisdiction of this Court may be found in 28 USC §1254 (1). The Judgment of the Court of Appeals below was dated June 29, 1984, and rehearing was denied under date of August 29, 1984, and each was entered on or after the date indicated in the Order.

CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVES.

U.S. Const. Amend. IV

U.S. Const. Amend. V

U.S. Const. Amend. VI

U.S. Const. Amend. VIII

U.S. Const. Amend. XIV

18 USC §2 (aiding & abetting)

19 U.S.C.A. §1581(a)

21 USC §841 (a)(1) (possession with intent to distribute marijuana)

21 USC §846 (conspiracy with intent to distribute marijuana)

21 USC §963 (conspiracy to import marijuana)

CONCISE STATEMENT OF THE FACTS

Your Petitioners seek review of the 5th Circuit opinion upholding admissibility of marijuana at trial and sufficiency of the evidence, despite Petitioners' constitutional challenges to admissibility and sufficiency. At pp. 16-17 of the slip opinion sought to be reviewed, the 5th Circuit said (emphasis and brackets by counsel) as to Murray, who was arrested without a warrant:

> ". . . An officer stationed a quarter mile from the residence [at 129 Roan Lane] was ordered to arrest Murray as he departed the area. While Murray was stopped and searched, he informed officers that he had just stopped at 129 Roan Lane to ask directions. Murray was then *placed under arrest and taken back to the residence.* Murray contends that his arrest was illegal because at that time the only evidence that tended to link him to the [alleged] conspiracy was a telephone call [on November 3] from the suspects at the Slidell Ramada Inn to the Roan Lane residence. *We agree that the arresting officer did not have probable cause to arrest Murray.*"

Hartsel argued that his arrest was illegal and the evidence insufficient to sustain his conviction. The 5th Circuit rejected his argument that his warrantless arrest was without probable cause; the arresting officers entered onto the detached, single family residential premises where he was without his consent, arrested him on the porch, searched the curtilage (beyond his immediate reach) without warrant and without his consent, in the absence of any exigent circumstances went into that

home without a warrant and without his consent, "secured" the home, and hours later procured a search warrant from a state judge. The Court said (pp. 17-18, emphasis and brackets by counsel) as to Hartsel:

> ". . . When Murray left the Roan Lane officers decided to approach Hartsel in the front yard of th[at] residence. As officers approached, Hartsel moved towards the house. Officers asked Hartsel to stop and as officers were asking questions, marijuana gleanings were discovered on the grounds surrounding Hartsel. A closer investigation revealed particles of marijuana in the driveway and in the back of several trucks. Hartsel was then arrested and informed of his rights. * * *" [cites to the Slip Opinion are hereafter "p."]

Those so-called "gleanings" were, according to the uncontradicted evidence, virtually microscopic – amounting to far less than an ounce if carefully aggregated. In other words, the 5th Circuit rejected Hartsel's trespass *ab initio* argument.

In this case, there were three (3) sets of defendants, those arrested: (1) on November 3, 1981, aboard a 55' vessel [Arthur Desroches, Gary Merritt and Cori Desroches], (2) those arrested on November 4, after departing a motel [Richard Merrill, Charles McGill, Vernon Holt] and (3) your Petitioners Patrick Murray (a/k/a James Murphey, arrested in a car about ¼ mile from the home at 129 Roan Lane on November 4,) and John Hartsel (arrested on the porch of that home moments before). Petitioners were arrested without a warrant by state law enforcement officers.

Beginning of the Case: An Unverified Tip.—On November 2, 1981, U.S. Customs told Louisiana State Police of an "unverified tip that an attempt would be made to import a large volume of marijuana into eastern Louisiana," (p.2; Suppression Transcript [hereafter: "ST"] 101); no other details were provided. So, State police looked at: everything "from LaFitte to the Mississippi State Line," (ST 48), vehicles of all types (ST 102) and boats 24' + (ST 103).

Results of Dragnet Surveillances: A Robalo at a Ramada Inn, 11/3/81, 9 AM to Sunset.—On the morning of Nov. 3, police saw a Jeep pick-up truck and trailered Robalo sport fishing boat with Florida tags at the Ramada Inn in Slidell; per a record check, they belonged to Richard Merrill, allegedly a suspected smuggler, a guest at the motel, p. 2.

McGill drove the Jeep with Robalo to Ft. Pike, a boat launch area, where he met Merrill, allegedly via circuitous routes to that site. They untrailered the boat, launching it about sundown towards the Rigolets, a pass connecting Lake Pontchartrain and Lake Borgne. Lake Borgne opens into the Mississippi Sound which is part of the Gulf of Mexico. "Police lost sight of the boat and its occupants after it left the dock. At approximately 11:30 p.m. the officers requested . . . St. Tammany Parish Sheriff's patrol boat enter Lake Pontchartrain and look for the Robalo. At approximately 11:35 p.m., however the Robalo returned to the Fort Pike launch," p.3.

"As McGill and Merrill were loading the Robalo on their trailer, agents at Fort Pike overheard McGill or Merrill state: 'Don't know why they're so mad, we did

the best we could with what we had,' which officers interpreted as . . . the Robalo had met with another vessel. Merrill and McGill were followed back to the Ramada Inn in Slidell where officers maintained a surveillance. The sheriff's patrol boat was ordered to look for a larger 'mother' vessel on Lake Pontchartrain." p.3.

Detention of M/V FORTY, 11/3/81, 11:30 P.M. to Apx. 11/4 at 3 AM. —"At approximately 11:40 p.m. the patrol boat spotted the M/V FORTY, a 55-foot wooden hull vessel with the configuration of a vessel used to transport work crews in the offshore oilfield. The officers pulled alongside the vessel, instructed the vessel to stop, and asked the crew to identify themselves and state their business. Captain Arthur DesRoches advised officers that he and his crew, Gary Merritt and Cori DesRoches, were from Miami, Florida and . . . were diving for treasure . . . [near] Mandeveille, Louisiana. The officers did not believe this unusual reason for being in the area, they also noted that the vessel reeked of pine oil— . . . often used by smugglers to hide the odor of marijuana. . . . [Next], officers asked the M/V FORTY to follow them to Geohegan's Marina, located on the Rigolets across from Fort Pike," pp. 3-4. However, the Sheriff's patrol boat remained on shore from approximately 6:30 P.M. to 11:30 P.M. (ST 150), a few minutes thereafter learned the Robalo had returned to its original Ft. Pike launch site (ST 152, 198), and then they saw the M/V FORTY. The State police who were on shore unable to see the vessels (Lt. Milan) ordered the Sheriff's vessel to stop the M/V FORTY, and the deputy sheriff (Capt. Dobson) commanding the sheriff's boat would not have stopped it otherwise (ST 200) or ordered it to shore (ST 202, 203). At no time did Captain

Dobson observe any proscribed or unlawful activity aboard the vessel FORTY, despite ample opportunity for such observation, and despite an allusion to a possible absence of one light (ST 200, 154, 185).

Before Customs boarded, Capt. Dobson boarded and searched (ST 188) without a warrant, and although not giving *Miranda* warnings told the men to remain silent until Customs arrived, ST 188, 204. "After the M/V FORTY arrived at Geohegan's Marina, a United States Customs official boarded the vessel and entered the hold to compare the main beam number with the vessel's documentation papers. Customs officers noticed that the vessel was wet with pine oil, and contained food products from Colombia and Venezuela. They also found marijuana gleanings in the hold. After obtaining this evidence, all three men were arrested. As Arthur DesRoches produced identification he dropped several pieces of paper including the business card of Charles McGill into the water," p. 4. Despite the vessel remaining wet from and reeking of pine oil, the men aboard were not wet and did not smell from it.

"The prosecution established that the M/V FORTY passed under the Southern Railway bridge on November 3, 1981, at approximately 6:20 p.m., westbound into Lake Pontchartrain. The railway bridge is west of the Fort Pike boat launch so a vessel entering Lake Pontchartrain from the Gulf of Mexico would first pass the boat launch at Fort Pike (on the Rigolets which connects Lakes Pontchartrain and Borgne) and then go under the railway bridge into Lake Pontchartrain. A vessel resembling the Robalo passed the bridge westbound at 7:23 p.m. The FORTY came through the bridge eastbound out of Lake Pontchartrain at 11:24 p.m. and

the vessel resembling the Robalo was behind the FORTY and cleared the bridge at 11:25 p.m. Only ten other vessels passed under the bridge between 6:20 and 11:25 p.m.," pp. 4-5.

"State police continued . . . [their] surveillance over suspects Merrill and McGill at the Ramada Inn in Slidell, Louisiana. Between 12:30 p.m. and 2:00 a.m. the officers observed movement and visiting between the rooms of Merrill, McGill and another guest—Vernon Holt. At approximately 9:00 a.m. the next day, November 4, the three men left the Ramada Inn in separate vehicles. Merrill and McGill drove east on Interstate 10 while Holt went west. All three individuals were stopped and arrested [without a warrant] by Louisiana State Police officers," p.5.

Telephone Records Lead to 129 Roan Lane Home.—"An investigation [without any warrant] of records of telephone calls at the Ramada Inn revealed that a call had been placed from Vernon Holt's room to occupants of a residence at 129 Roan Lane in Lacombe, Louisiana, a community approximately 12 miles from Slidell. The residence was already under surveillance for suspected narcotics activity and Patrick Murray a/k/a James Murphey and John Hartsel were observed on the premises at approximately 9:00 a.m. on November 4. [Those premises had already been under surveillance for about 10 months continuously by law enforcement officers, ST 117, but immediately before November 4, 1981, no one had probable cause but only bare suspicion of illegal activity at 129 Roan Lane, ST 118—but totally unconnected with these defendants, ST 124.] State Police arrested Murray as he left the residence. [However, the uncontradicted evidence was that at the time Murray was arrested in

his automobile approximately ¼ mile away, that he was arrested upon orders of Lt. Milan and ordered back to Roan Lane at a time when Lt. Milan of the State Police had *no* knowledge that there was any marijuana on the premises, ST 127, and according to Lt. Milan they only had probable cause after the arrest of Hartsel and Murray, ST 128.]

"After Murray's arrest, he was taken back to 129 Roan Lane. At the residence, Murray was informed of his Miranda rights and his rights to refuse to permit officers to search his car. Murray then signed a consent to search form. Officers found $2,000 cash and an airline ticket in the trunk, and a rental agreement for the car in the glove compartment. In view of Murray's consent, the trial court did not err in admitting the evidence," pp. 16-7, according to the 5th Circuit. However, the uncontradicted testimony revealed that there was a minimum of 8 law enforcement vehicles and a minimum of 12 law enforcement agents at the premises at that time (ST 131; photographs showed even more agents, but that may or may not have been later), so that the "consent" was not valid.

" . . . Officers then approached Hartsel in the front yard of the residence; as he attempted to enter the house he was asked to stop and give his name. As Hartsel identified himself, agents noticed marijuana gleanings on the ground and Hartsel was arrested and informed of his rights. Hartsel was asked if marijuana was being concealed on the premises and he responded: 'I didn't put it there.' The premises were then secured while authorities obtained a search warrant. When the residence was searched approximately 1,500 pounds of marijuana were found," pp. 5-6. However, the

uncontradicted facts revealed, including photographs inside the house taken by law enforcement officers without the consent of Hartsel (ST 139), that there were between 12 and 18 officers, that the home was entered and thoroughly searched in the morning before a warrant from a state judge was secured at about 5:19 P.M. on November 4, ST 140. Importantly, the Government never contended that Hartsel consented to a search of the home, and indeed he did not, ST 138. The uncontradicted facts also revealed that the so-called "gleanings" were very small particles and could not be seen unless one were both on the premises, ST 128, and "physically standing right next to it," ST 129; one could not detect any odor of marijuana before entering residential premises, ST 129. The uncontradicted facts showed that: *before* their arrest, neither Hartsel (ST 114) nor Murphey (ST 121) was known to law enforcement; on November 4, both were observed only outside the 129 Roan Lane home, talking or drinking a beer, and not doing anything unlawful at all, ST 116, 127; that local police gave the order both to arrest Murray *and bring him back to Roan Lane*, ST 126-7, *before* the police had any knowledge as to who he was and before he or Hartsel was asked any questions, ST 127.

Defendants contended that there were no exigent circumstances, *e.g.*, "Supplemental Memorandum in Support of Motion(s) to Suppress of Defendants Murphey, Hartsel and Merritt," at. pp. 11-2.

> Q Sir, with all the array of officers that you had around there [129 Roan Lane], the twelve-plus number of agents, if you wanted to secure the premises until the search warrant was issued, couldn't you have done so from across the street, or without going on the premises?

A [By Lt. Milan, lead investigator, ST 135, line 14] I suppose so, sir." ST 141 [bracketed material by counsel]

At trial, "A [purported] government expert was able to place the M/V FORTY at the Roan Lane address because several of the tires used as bumpers on the stern of the vessel left [supposedly] distinctive impressions on the dock. This and other circumstantial evidence supported the prosecution's theory that the Robalo led the M/V FORTY from Lake Pontchartrain through the connecting bayous and canals to the Roan Lane residence where the FORTY discharged a large quantity of marijuana," p.6. Therefore, the 5th Circuit relied upon the evidence sought to be suppressed in concluding the evidence was sufficient to support the convictions of Hartsel and Murphey.

Procedural History. – After the above arrests, on December 10, 1981, a federal grand jury of the Eastern District of Louisiana returned a four (4) count Indictment against eight (8) defendants: Richard E. Merrill, (since deceased so his case is moot); Charles McGill; Vernon Holt; Patrick Murray a/k/a James Murphey; John Hartsel; Gary Merritt; Arthur DesRoches, and Cori DesRoches. It charged them with violations of 21 USC §841(a)(1) (possession with intent to distribute marijuana), 21 USC §846 (conspiracy to possess with intent to distribute marijuana), 21 USC §952 (import of marijuana), 21 U.S.C. §963 (conspiracy to import marijuana), and 18 USC §2 (conspiracy). The charges arose from a seizure of approximately 1,500 pounds of marijuana by Louisiana State Police, per an unsubstantiated tip to U.S. Customs relayed to the state police (Rec. Vol. IV, p. 1).

Per not guilty pleas, the "first" jury trial began on May 17, 1982, against the eight defendants. The Court granted a mistrial in favor of five defendants: Holt, Murray (a/k/a Murphey), Hartsel, Arthur DesRoches and Cori DesRoches. This "first trial" proceeded as to Merrill, McGill and Merritt and the jury returned a verdict of guilty as charged on all four counts as to them. A "second jury trial" proceeded in July as to defendants Holt, Murray (a/k/a Murphey), Hartsel, Arthur DesRoches, and Cori DesRoches. In this second trial, the Court granted Petitioner Murray's motion for a severance. The jury convicted Holt, Hartsel, and the two DesRoches of all four counts as charged in the indictment on July 16, 1982. In a "third" trial that jury convicted Murray (a/k/a Murphey) of four counts charged in the Indictment.

All defendants filed motions to suppress statements and evidence (*e.g.*, R 616 at 619) upon which an evidentiary hearing was held, but the motions were denied; objections to the evidence sought to be suppressed were duly lodged; all filed post-trial motions for judgments of acquittal or new trial. The Court granted such motions for acquittal in favor of Gary Merritt and Cori DesRoches, and in October 1982, entering a judgment of acquittal (R 828), but denied other post-trial motions.

The Government appealed the judgment of acquittal granted for C. DesRoches and Merritt (5th Circuit Case No. 82-3736; R 819). In the companion appeals the other defendants timely appealed their convictions and sentences (R 841, 847, 845; 842, 844, 848; 830, 846; 835, 843). The 5th Circuit affirmed the judgments of acquittal and the convictions in a single opinion, and denied motions for rehearing.

JURISDICTION OF THE U.S. COURT OF APPEALS AND THE U.S. DISTRICT COURT

All defendants were prosecuted for federal crimes and they timely appealed to the U.S. Court of Appeals.

ARGUMENT

Question 1.

WAS THE WARRANTLESS ARREST OF MURRAY MADE BY LOCAL POLICE WITHOUT PROBABLE CAUSE, SO THAT REGARDLESS OF PURPORTED "CONSENT TO SEARCH" SUPPRESSION SHOULD HAVE BEEN ORDERED AND EVIDENCE EXCLUDED UNDER THE 4th, 5th AND 14th AMENDMENTS?

The 4th Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Therefore, all searches without a valid warrant are unreasonable unless shown to be within one of the exceptions to the rule that a search must rest upon a valid warrant, and the burden is upon the Government to show that the search comes within an exception.

Coolidge v. New Hampshire, 403 U.S. 443 (1971); *Beck v. Ohio*, 379 U.S. 89 (1964); *Stoner v. California*, 376 U.S. 483; *U.S. v. Jeffers*, 342 U.S. 38 (1951). The six basic exceptions to the warrant requirement are: consent, incident to a lawful arrest, with probable cause to search and exigent circumstances, in hot pursuit, border search, stop & frisk. As to Murray a/k/a Murphey, the 5th Circuit correctly held his arrest was illegal as not based upon probable cause:

> "Murray [a/k/a Murphey] contends that his arrest was illegal because at that time the only evidence that tended to link him to the conspiracy was a telephone call from the suspects at the Slidell Ramada Inn to the Roan Lane residence. *We agree that the arresting officer did not have probable cause to arrest Murray.*"
>
> pp. 17 (emphasis by counsel).

But the 5th Circuit said: "In view of Murray's consent, the trial court did not err in admitting the evidence [cites omitted]." That Court implicitly rejected any other justification for the search and seizure of the subject evidence. Your Petitioner respectfully submits that under the doctrine of the "fruit of the poisonous tree," the evidence admitted should have been suppressed.

Probable Cause, Vel Non. — The 5th Circuit was obviously correct that there was no probable cause to permit a warrantless arrest and then a search incident to that lawful arrest because: (1) there was no probable cause and (2) the warrantless search *preceded* the arrest, and that there were no "exigent circumstances" purporting

to authorize a warrantless search of his person, car or the home where he was taken.

Purported "Consent" Is Vitiated by an Illegal Arrest. —This Court announced a decided preference for warrants, for both search and arrest. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Chimel v. California*, 395 U.S. 752 (1969); *U.S. v. Ventresca*, 380 U.S. 102 (1965); *Aguilar v. Texas*, 378 U.S. 108 (1964); *U.S. v. Jeffers*, 342 U.S. 38; *McDonald v. U.S.*, 335 U.S. 451 (1948); *U.S. v. Lefkowitz*, 285 U.S. 452 (1932); *Agnello v. U.S.*, 269 U.S. 20 (1925); *Carroll v. U.S.*, 267 U.S. 132 (1925); see also: *U.S. v. U.S. District Court*, 407 U.S. 297, 315-6 (1972); but cf. *Illinois v. Gates*, ____ U.S. ____ (1984). *Gates, supra*, confirmed the definition of probable cause of *Brinegar v. U.S.*, 338 U.S. 160, 175 (1949) and *Henry v. U.S.*, 361 U.S. 98 (1959), including the important admonition that "an arrest is not justified by what the subsequent search discloses."

Murphey was in custody by an illegal arrest, so the Government did not and could not have proved a "voluntary consent" by him. In *Bumper v. North Carolina*, 391 U.S. 543 (1968), there was "custody," so that an individual's mere submission to the authority of the police did not suffice for voluntary consent, which invalidated the search. *Johnson v. U.S.*, 333 U.S. 10 (1948); *Vale v. Louisiana*, 399 U.S. 30 (1970); compare: *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). *Judd v. U.S.*, 190 F.2d 649 (D.C. Cir. 1951) held invalid a defendant's "consent" for a warrantless search of his home, when he was in jail under a warrantless arrest. See also: *Amos v. U.S.*, 255 U.S. 313 (1921); compare *Johnson v. Zerbst*, 304 U.S. 458 (1937) (6th Amendment waiver). The instant opinion departed from *U.S. v. Robinson*,

625 F.2d 1211 (5th Cir. 1980) and conflicts with *Brown v. Illinois*, 422 U.S. 590, 603-4 (1975), by failing to make careful inquiry as to the factors involved with "casual connection" between the illegal seizure and consent to search.

Exclusionary Rule.—Evidence seized in violation of the Constitution is inadmissible in federal courts and federal standards govern. *Mapp v. Ohio*, 367 U.S. 643 (1961), 84 A.L.R. 993; *Traub v. Connecticut*, 374 U.S. 493 (1963). Evidence or leads obtained by violations of the Constitution are inadmissible under the "fruit of the poisonous tree" and "silver platter" doctrines, *Silverthorne Lumber Co. v. U.S.*, 251 U.S. 385, 392 (1920); *Wong Sun v. U.S.*, 371 U.S. 47 (1963); *Nardone v. U.S.*, 308 U.S. 388 (1939); *Davis v. Mississippi*, 394 U.S. 721 (1969); *Harrison v. U.S.*, 392 U.S. 219 (1968). "If evidence illegally obtained leads a government to substantially intensify an investigation, all subsequently discovered evidence is tainted by the initial illegality," *U.S. v. Schipani*, 289 F. Supp. 43, 62 (E.D.N.Y., 1969) aff'd. 414 F.2d 1262 (2d Cir. 1969). "Under our Constitution, no Court . . . may serve as an accomplist in the willful transgression of the laws of 'the United States.' . . .," *Lee v. Florida*, 392 U.S. 378 (1968).

Standing.—The Government contended Murray was the owner of the M/V FORTY; as owner, he had unquestioned standing to challenge evidence seized or derived from the illegal detention, search and seizure of that vessel. As renter in possession of the rental vehicle, he had unquestioned standing to suppress items and papers seized from the vehicle. As one present on the premises at Roan Lane, and indeed brought there by police, he had standing to assert suppression of the

contraband seized there; indeed, the Government should be estopped to deny that he had standing as regards the Roan Lane home premises. As to telephone records seized without warrant, *Katz* is controlling; in *Katz* use of a public telephone was protected since one has a reasonable expectation of privacy; thus, as here, use of a private phone in the Ramada Inn (phoning a single-family residence at Roan Lane) is protected under the 4th Amendment.

Question 2.

WERE THE WARRANTLESS STOP, ARREST, DETENTION, SEIZURE IN LAKE PONTCHARTRAIN AND THEN THE PERVASIVE SEARCH OF THE *M/V FORTY* DOCKSIDE BY LOCAL POLICE EACH UNCONSTITUTIONAL, AND NOT PROTECTED BY BROAD CUSTOMS OR COAST GUARD AUTHORITY CONTAINED IN SUCH STATUTES AS 19 U.S.C. §1581 (a) OR BECAUSE OF EXIGENT CIRCUMSTANCES, AND SO CONTRARY TO THE 4th, 5th and 14th AMENDMENTS?

The stop, arrest, seizure and detention were without probable cause to believe a criminal violation was occurring or had just occurred, and without probable cause or reasonable certainty that the vessel had just crossed or was about to cross an international border, where there was no immediate access to the open sea, and where its progress toward the sea was impeded by several "drawbridges." The vessel and crew did not willingly "consent" to the stop, arrest, detention, seizure or search, which extended beyond a mere document

and registration number or safety check. There were no exigent circumstances. Therefore, the District Court committed reversible error in denying the motions to suppress and in admitting tangible items and statements, which were fruits of the poisoned tree, during the trial. More particularly the Government failed to meet its burden of proof.

Introduction. — The issue here is:

> "May local police (unaccompanied by Customs or Coast Guard) stop, detain, seize, board a U.S. vessel underway in inland waters (and not a hazard to navigation or with crewmen in distress), order it dockside and thoroughly search the vessel, its master and crew *without* warrant where it was so sighted, boarded, docked under gunpoint and searched all in 'inland waters' but *without* both probable cause and without reasonable certainty before the seizure that it had crossed a U.S. border?"

The answer is "No." A very recent 5th Circuit "all fours" case so indicates, *U.S. v. Guillen-Linares*, 643 F.2d 1054, 1056 (5th Cir. 1981) following compliance with remand in 636 F.2d 78 (5th Cir. 1981), as does traditional 4th and 14th Amendment analyses, which indicates that there were no exigent circumstances or other exceptions to the warrant requirement. *United States v. Villamonte-Marquez*, ____ U.S. ____, 103 S.Ct. 2573 (1983) is not contrary. Next, the factors in the "airplane" and "vessel" search cases that resulted in conclusions of "illegal search and seizure" are present here, (but the factors showing a "valid search and seizure" are not.) Lastly, your Petitioners emphasize that: the

Fourth & Fourteenth Amendments protect more interests than just privacy.

The "All Fours" Case: ***Guillen-Linares.*** — *Guillen-Linares* states at n. 5, and following:

> " . . . *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973) [explains:] 'It is clear, of course, that no Act of Congress can authorize a violation of the Constitution. But under familiar principles of constitutional adjudication, our duty is to construe the statute, if possible, in a manner consistent with the Fourth Amendment,"
>
> "In *United States v. Serrano*, 607 F.2d 1145, 1148 (5th Cir. 1979), cert. denied, 445 U.S. 965, 100 S.Ct. 1655, 64 L.Ed2d 241 (1980), we held that "customs officers may make an investigatory stop of a vessel on inland waters adjacent to the open Gulf of Mexico under 19 U.S.C.A. §1581(a) on facts which justify a reasonable suspicion of illegal activity." *See also United States v. Williams*, 617 F.2d 1063, 1072 n. 3 (5th Cir. 1980) (en banc). In *United States v. D'Antignac*, 628 F.2d 428 (5th Cir. 1980), cert. denied, ____ U.S. ____, 101 S.Ct. 1485, 67 L.Ed.2d 617 (1981), we formulated this holding into a test, ruling that the constitutionality of a section 1581(a) boarding in inland waters turns 'on one of the following two principles: (1) a border search; or (2) a limited investigatory stop based upon a reasonable suspicion of law violation.' *Id.* at 433. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 884, 95 S.Ct. 2574, 2582, 48 L.Ed.2d 607 (1975); *United States v. Whitaker*, 592 F.2d

826, 829 (5th Cir.), *cert. denied*, 444 U.S. 950, 100 S.Ct. 422, 62 L.Ed.2d 320 (1979). *See also United States v. Stanley*, 545 F.2d 661 (9th Cir. 1976), *cert. denied*, 436 U.S. 917, 98 S.Ct. 2261, 56 L.Ed.2d 757 (1978).

> "It is clear from the record before us that the boarding of the Miss Port Canaveral did not constitute a border search. Thus, the issue is whether, absent any articulated facts or circumstances which might have aroused in the customs officers a reasonable suspicion of illegal activity the seizure of the Miss Port Canaveral was reasonable under the Fourth Amendment. We find that it was not, and . . . reverse the . . . denial of [their] motion to suppress."

Accord: Florida v. Casal, 410 So.2d 152 (Fla. 1982), *cert. dism'd.* ____ U.S. ____, 103 S.Ct. ____ (1982); *Morales v. State*, 407 So.2d 321, 328-9 (Fla. 3d DCA 1981) (*but*, vessel observed to cross U.S. border); *State v. Zafra*, 408 So.2d 745 (Fla. 3d DCA 1982) (no evidence of border crossing or functional equivalent and no prior reasonable suspicion of illegal activity); *State v. Doyle*, 409 So.2d 1168 (Fla. 3d DCA 1982) (remand to determine standing). *See also U.S. v. Williams*, 544 F.2d 807 (5th Cir. 1977) summarized in *U.S. v. Whitaker*, 592 F.2d 826 (5th Cir. 1979), *U.S. v. Warren*, 578 F.2d 1058, p. 1065 n.4 (5th Cir. 1978) (en banc).

Villamonte-Marquez. *Distinguishable.* — *United States v. Villamonte-Marquez*, ____ U.S. ____, 103 S.Ct. 2573 (1983) is limited to its facts and distinguishable as it only authorized boarding a *foreign flag* vessel in U.S.

waters that "provided ready access to the open sea." *Villamonte* involved a *foreign* flag vessel (Swiss), p. 2577; the M/V FORTY was a U.S. flag vessel with a home port of Miami painted on its stern. The vessel in *Villamonte* had "ready access to the open sea," p. 2580; here, the testimony showed the vessel M/V FORTY was travelling on inland waters, headed out of Lake Pontchartrian, but impeded by several "swing out" type drawbridges when it was stopped by armed, uniformed Sheriff's deputies in their marked police boat; thus, it had no ready access to the open sea. In *Villamonte*, U.S. Customs were aboard the local police boat in a ship channel (p. 2576). Here, Customs for the first time met the vessel dockside *after* the stop on the Lake (and trip to the dock under escort) and after an *extensive search* without a warrant by the local police officers who found nothing illegal. The *Villamonte* sailing vessel was anchored in a ship channel; this vessel was underway, on an inland waterway. In *Villamonte* the officers worried about the safety of the vessel-and-crew anchored in the ship channel; police had no such concern here. There was no showing of any recent crossing of any U.S. border here, unlike *Morales v. State*, prior to the stop or boarding dockside.

The District Court listed cases analyzing relevant factors. Unlike *U.S. v. Ruano*, 647 F.2d 577 (5th Cir. 1981) and *U.S. v. Whitmire*, 595 F.2d 1301 (5th Cir. 1979), this vessel was not speeding; unlike *Ruano*, it was alone in the area. Unlike *Whitmire*, it was not heavy with cargo and was not observed to be in "customs waters," 3-12 miles off the coast. Unlike *U.S. v. D'Antignac*, 628 F.2d 428 (5th Cir. 1980), *cert. den.* 450 U.S. 967, it made no erratic movement and did not "shrimp out of season," but had diving equipment aboard.

Unlike *Villamonte*, police had no concern for the safety of this vessel or its crew, as it was not moored in a busy ship channel, and police *sub judice* made no oral inquiry about safety. This vessel, its owner(s) or operators were not on a "list" of suspect vessels, see: *U.S. v. Morin*, 665 F.2d 765 (5th Cir. 1982) and *U.S. v. Williams*, 617 F.2d 1063 (5th Cir. 1980) (en banc). (The Government urges the vessel was registered to Murphey.)

This case does *not* involve: a Coast Guard search within "customs waters" *U.S. v. Freeman*, 579 F.2d 942 (5th Cir. 1978) or a *sighting* within "customs waters". Here, police searched first, found nothing and only then did Customs board dockside and search, see: *U.S. v. Whitaker*, 592 F.2d 826, 829 (5th Cir. 1979) (alternative holding: exigent circumstances; concurring: probable cause present), *reh. en banc den. mem.* 601 F.2d 586 (1979), *cert. den. mem.* 444 U.S. 950 (1979); *U.S. v. Norman*, 701 F.2d 295 (4th Cir. 1983) (Coast Guard boarding for document search in Chesapeake Bay upheld; strong smell of marijuana); *Blair v. U.S.*, 665 F.2d 500, 503 (4th Cir. 1981) (admission or confession by crewman during *surveillance* before boarding, plus smell of marijuana); *U.S. v. Jonas*, 639 F.2d 200, 201 (5th Cir. 1981) (Coast Guard boarding U.S. vessel in international waters where vessel on "lookout list," its document inspection was not a pretext, and its questioning on high seas not yet "accusatory").

This case is also unlike *U.S. v. Demanett*, 629 F.2d 862 (3d Cir. 1980), *cert. den. mem.* 450 U.S. 910 (1981). *Demanett* was a Coast Guard stop and boarding for both documents and a safety equipment check; in this case the stop and boarding was by local police unaccompanied by Customs or Coast Guard. *Demanett*

adopted an "articulable and reasonable suspicions" standard for determining whether a vessel should be stopped and boarded by Coast Guard officers; the Court held the standard was met as the Coast Guard saw a fishing trawler with inappropriate, broken outfittings. Also, that trawler's location, speed and direction (in-bound to Delaware Bay) were unusual.

Unlike *U.S. v. Robbins*, 623 F.2d 418 (5th Cir. 1980), *U.S. v. One (1) 43 Foot Sailing Vessel 'Winds of Will'. . .*, 538 F.2d 694 (5th cir. 1976, reh. den. 1976) (forfeiture proceeding) and *U.S. v. Serrano*, 607 F.2d 1145 (5th Cir. 1980), this vessel was not running without lights. Testimony about lights was at best ambiguous, but Lt. Dobson who saw the vessel said he would not have stopped the vessel, but he was ordered by Lt. Milan who did not see it to stop it, so that the Government did not meet its burden.

Traditional Analysis. — Unquestionably, the stop by the Sheriff's police boat was a "seizure" within the 4th Amendment, *U.S. v. Williams*, at n.1, p. 1071. Where an arrest or seizure is without a warrant the presumption is that the arrest or seizure is contrary to the 4th Amendment, and the Government bears the burden of proof to overcome the presumption; *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

A search and seizure by state officials is presumptively invalid under the 4th and 14th Amendments and Article I, §5 of the Louisiana Constitution (1974) when conducted without a search warrant, subject only to few, narrow exceptions. *Katz v. United States*, 389 U.S. 347 (1967); *Norman v. State*, 370 So.2d 643 (Fla. 1980); *Pomerantz v. State*, 372 So.2d

104, 108 (Fla. 3d DCA 1979). The state has the burden of proving that such an exception applies in a given case. *Norman v. State, supra; Taylor v. State*, 355 So.2d 180, 183 (Fla. 3d DCA 1978), *cert. denied*, 361 So.2d 835 (Fla. 1978).

The trial court's reliance upon *U.S. v. Ivey*, 546 F.2d 139 (5th Cir. 1977) is misplaced. The instant proceeding was a local police investigation, (R.V. 5, pp. 18, 62, 77, 106 and see p.16), unlike *Ivey*, where U.S. Customs in foreign or international airspace initiated and pursued the investigation, p.141, so that *Ivey* was a "border search of a plane." Since *Ivey* involved an aircraft, different rules pertained, 19 USC §1642 (1965), 19 CFR §§6.2, 6.3 and 6.14 (1965). None of those factors are present here.

Under *Illinois v. Gates*, ____ U.S. ____ (1983), there was no probable cause; (please see Question 1, *infra*); nor was the stop of the vessel a *"Terry"* stop, *Terry v. Ohio*, 392 U.S. 1 (1968).

In short, the M/V FORTY was *not* searched "at the border" with probable cause by Customs; it was detained, seized while travelling on an inland lake, ordered at gunpoint to travel to a dock and then searched "dockside" without probable cause by local police who found nothing illegal *before* Customs ever arrived dockside, and without "reasonable certainty" that the vessel had crossed (or was about to cross) an international border, see: *U.S. v. Niver*, 689 F.2d 520 (5th Cir. 1982). This case is like *U.S. v. Tilton*, 534 F.2d 1363 (9th Cir. 1976) and the 1977 *Williams* case, as the search was done without reasonable certainty or probable cause (in those cases, the cause was remanded). Reasonable

certainty is a higher standard than probable cause, *id.*, p. 1366. (Again, the M/V FORTY was going from one U.S. lake to another and was not between 3-12 miles outside the coast, *U.S. v. Hidalgo-Gato*, 703 F.2d 1267 [11th Cir. 1983]).

Privacy is Not the Limit of Fourth and Fourteenth Amendments. — The Fourth Amendment "protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all," *Katz v. U.S.*, 389 U.S. 347, 350 (1967). See: *U.S. v. Holmes*, 521 F.2d 859, 864 (5th Cir. 1979), reh. gr. 525 F.2d 1364 (1976), aff'd. on reh. en banc 537 F.2d 227 (1976); *Mapp v. Ohio*, 367 U.S. 643 (1961).

Marshall v. Barlows', Inc., 436 U.S. 307 (1978) invalidated warrantless federal administrative searches of commercial premises under the Occupational Safety and Health Act of 1970 (OSHA); *Barlows'* held unconstitutional a federal statute. *Barlows'* makes several important points:

> *first*, the Warrant clause of the Fourth Amendment protects commercial establishments as well as private homes (p.311) so that warrantless searches of commercial premises are generally unreasonable. (p.312).
>
> *second*, "The general warrant [,] a . . . point of contention in the Colonies immediately preceding the Revolution [,] . . . was acutely felt by . . . businessmen whose premises and products were inspected for compliance with . . . parliamentary revenue measures that

> most irritated the colonists. [T]he Fourth Amendment [contravened] . . . sweeping power to *customs officials* and other agents of the King to search at large for smuggled goods. *United States v. Chadwick*, 433 U.S. 1, 7-8 (1977). See also *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 355 (1977)," *id.*
>
> *third*, "The authority to make warrantless searches devolves almost *unbridled discretion* upon executive and administrative officers, particularly those in the field, as to when . . . and whom to search. A warrant by contrast, . . . provide[s] assurances from a neutral officer[:] . . . the inspection is reasonable under the Constitution . . . authorized by statute, . . . pursuant to an administrative plan containing *specific neutral criteria*, advise[s] the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed." p 324.

Accord: *Camara v. Municipal Court*, 387 U.S. 523 (1967); *See v. Seattle*, 387 U.S. 541, 543 (1967), both of which, like this case involved local government officers conducting the inspection and unlike *Marshall v. Barlows'* where federal inspectors were involved. Axiomatically, a search cannot be justified by what it produces, nor an arrest justified by a fruit of an illegal search. *E.g.*, *Wong Sun v. U.S.*, 371 U.S. 471 (1963); *Johnson v. U.S.*, 333 U.S. 10 (1948); *Sibron v. U.S.*, 392 U.S. 40 (1968). Similarly, *Miranda* warnings cannot "attenuate" the taint of an unconstitutional arrest, *Brown v. Illinois*, 422 U.S. 590, 602 (1975), under the Fourth and Fifth Amendments; accord: *Dunaway v. New York*, 442 U.S.

200 (1979); nor can the state present this on a "silver platter" to federal officials, *Silverthorne v. U.S.*, 251 U.S. 385 (1920).

Search Unreasonable Because Too Extensive. — "Delineating the scope of a search with some care is particularly important where documents are involved . . . 29 USC §657(c)," *Marshall v. Barlow's*, at p. 324 n. 22.

Assuming, *arguendo*, limited administrative type searches are constitutional, such a detention and search becomes unconstitutional the moment the intrusion is no longer "limited in scope." The moment it is extended in any way—absent probable cause to justify such an extension—then the seizure becomes unconstitutional; *U.S. v. Brignoni-Ponce*, 422 U.S. 873 at 881-2; *Terry v. Ohio*, 392 U.S. 1 at 29; *U.S. v. Warren*, 578 F.2d 1058 (5th Cir. 1978) (en banc), *dissent* at 1083-4 [discussing 14 USC §89 (a)], *cert. den. mem.* 446 U.S. 956.

Question 3.

WITHIN THE STRICTURES OF THE 5th, 6th AND 14th AMENDMENTS, WAS THE EVIDENCE INSUFFICIENT TO SUSTAIN A CONVICTION OF CONSPIRACY TO POSSESS, CONSPIRACY TO IMPORT, OF POSSESSION WITH INTENT TO DISTRIBUTE OR TO IMPORT MARIJUANA?

Under traditional sufficiency of evidence tests and rules, the evidence adduced here was not sufficient to sustain any conviction and under familiar 5th Amendment due process rules, no conviction can be sustained where

there is a lack of evidence as to a key element of an alleged crime or where there is so manifest a lack of weight of evidence that a conviction cannot be sustained. Therefore, the 5th Circuit departed from settled Constitutional principles (in conflict with decisions of this Court and other Circuits) and committed error in not holding that motions for directed verdict and post-trial motions of your Petitioners for acquittal or for new trial should have been granted.

Introduction: Tests and Initially Only Microscopic Marijuana Particles. — The 5th Circuit, apparently approved by the 11th Circuit, established a test, listing all the factors to be considered in "boat cases". However, in the instant case, the 5th Circuit departed from the rules related thereto and the principles *sub judice* conflict with those of *U.S. v. Carrion*, 457 F.2d 200 (9th Cir. 1972), as to minimum proof of the origin of the contraband and knowledge of its origin; *Carrion* resulted in reversal of a conviction of smuggling marijuana for lack of sufficiency of evidence:

> "[Defendant's] possession of a map of Mexico, along with other maps, and his having a worn match book bearing an advertisement for a Mexican motel and [co-defendant's] having a slip of paper in his wallet with a few innocuous words in Spanish on it added nothing of significance. A similar harvest could be produced from an inspection of countless glove compartments of automobiles driven in the Southwest. An inference drawn from that evidence that the possessor had been in Mexico would be severely strained, and the further inference that the possessor had been in Mexico on a particular date would be wholly untenable."

Petitioners submit that *Carrion* warrants reversal of the substantive charges (possession with intent to distribute and importation). Murphey was briefly present outside the Roan Lane premises and Hartsel (despite his longer presence) was never observed inside either; certainly, neither was aboard any vessel herein with supposed foreign food. So far as the possession or importation was sought to be shown by evidence of aiding and abetting or through actions of co-conspirators, (and therefore as to the additional conspiracy/aiding & abetting charges), then the following arguments concerning the conspiracy charges apply.

The elements of a conspiracy charge require proof beyond a reasonable doubt that (1) the conspiracy existed, (2) the accused knew of the conspiracy, and (3) he voluntarily intended to join or associate himself with the objects of the conspiracy. *U.S. v. Rowe*, 670 F.2d 956, 963 (11th Cir. 1982); *U.S. v. Willis*, 639 F.2d 1335 (5th Cir. 1981); see generally, R 802-809. As *Carrion* disposes of the substantive charges, *U.S. v. Maslanka*, 501 F.2d 208 (5th Cir. 1974; reh. and reh. en banc denied, 1974) disposes of the conspiracy charges. In *Maslanka*, officers found large amounts of marijuana but desite wrappings indicating a Jamaican origin, the conspiracy-to-import convictions were reversed and the conspiracy-to-distribute convictions were based on "weak evidence."

The Government presented no "substantial evidence" that either Petitioner knew of or intentionally joined the charged distribution or importation conspiracy(ies). There is no involvement by Petitioners in any importation scheme. There was no informer testimony or co-defendant testimony linking these individuals with anyone else: no overheard or tape-recorded conversation between a

particular person at the Ramada Inn and one at Roan Lane or between the FORTY via radio transmissions to anyone else.

Evidence which tends to link an accused to an importation scheme is never sufficient to warrant a prosecution for possession and distribution. See: *U.S. v. Rodriguez*, 585 F.2d 1234 (5th Cir. 1978) aff'd on other grounds 612 F.2d 906 (5th Cir. 1980) (en banc), aff'd 450 S.Ct. 333 (1981). In short, importation conspiracies are different than distribution conspiracies, and frequently the membership does not overlap. *U.S. v. Malatesta*, 590 F.2d 1379 (5th Cir. 1979) *cert. den.* 99 S.Ct. 1508 (1979) stands for the propositions that: conspiracy to distribute and conspiracy to import are separate crimes requiring proof by substantial, competent evidence and separate trials are preferred where separate conspiracies are charged. The *Rodriguez* decision reversed two "conspiracy to distribute" convictions for essentially the same reasons asserted in this brief.

The 5th Circuit *sub judice* departed from and conflicts with settled law that mere presence at the scene where contraband is present, is not sufficient evidence to convict. The rule is well-settled, as explained in *U.S. v. Cole*, 628 F.2d 897 (5th Cir. 1980), that "mere presence" of a person on premises suspected as the site of illegal activity is not only insufficient to establish probable cause, but further fails to even provide the lesser threshold for a "*Terry*-type" search for weapons, *Terry v. Ohio*, 392 U.S. 1 (1968). In *Cole*, defendant pulled into an "attached" carport in a pick-up truck while agents were executing a valid search warrant on a residence. On alighting, agents frisked him, found a pistol in his belt,

and arrested him for unlawful possession of it. The 5th Circuit in *Cole* reversed a denial of his motion to suppress:

> "The Officer's pat-down of appellant cannot be justified by appellant's mere presence on the premises during the execution of a warrant. 'A person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search *that* person.' *Ybarra v. Illinois*, 444 U.S. 85 (1979). Mere presence neither obviates nor satisfies the requirement of *Terry v. Ohio*, 392 U.S. 1 (1968), that specific articulable facts support an inference that the suspect might be armed and dangerous. *Ybarra, supra*, 444 U.S. at 92. See also *U.S. v. Tharpe*, 536 F.2d 1098, 1100 (5th Cir. 1976) (en banc).
>
> Nor does the fact that the officers testified that they had previously received information of an undisclosed nature about appellant constitute reason to search under *Terry*. Without knowledge of the content of that information, the court cannot assess the reasonableness of the inference of dangerousness. The exceptions to the requirement of a warrant are narrow and jealously guarded and 'the burden is on those seeking the exemption to show the need for it'. *Arjabsas v. Sanders*, 442 U.S. 753, 760 (1979), quoting from *U.S. v. Jeffers*, 342 U.S. 48, 51 (1951). This burden was not met by testimony that the officers had prior information about appellant, absent proof that the information was of a sort from which an inference

of dangerousness could reasonably be drawn," p. 899.

U.S. v. Almas, 507 F.2d 65 (5th Cir. 1975) determined that one's presence near a scene of unlawful activity will not justify a vehicular stop, namely: probable cause supporting search for an apartment will not itself justify detention of a van and search of suitcases in it. *Almas* relies understandably upon *Beck* and *Adams v. Williams*, 407 U.S. 143 (1972) and *Brinegar v. U.S.*, 338 U.S. 160 (1949).

Factors to be considered in the boat "conspiracy" cases are the: size of vessel, size of crew, relationship between captain and crew, length of voyage (in days or distance), quantity of marijuana, and how the contraband was either wrapped or exposed or concealed from the senses (such as smell); the point about exposure/concealment was the basis for the vigorous *dissent* in the Fourth Circuit's *Blair* opinion; *e.g.*, *U.S. v. Robbins*, 623 F.2d 418 (5th Cir. 1980) on reh. granted 629 F.2d 1105 (5th Cir. 1980) [conviction affirmed under *Suarez/Glasser* test, *U.S. v. Suarez*, 608 F.2d 584, 586 (5th Cir. 1979) upon facts similar to *U.S. v. Alfrey*, 620 F.2d 551 (5th Cir. 1980)]. In short, both the Fourth and Fifth Circuits use very similar tests, but in employing those tests, different results may be achieved, per the *dissent* in *Blair* (4th Cir.), so that there is a conflict among the Circuits.

No marijuana was able to be observed (by sight or smell) at the Roan Lane premises from outside the property line. None of your Petitioners' clothes or personal effects smelled of marijuana.

In an "automobile case" the passengers' bodies and clothing smelling of marijuana supported a conviction, *Maslanka*. Therefore, evidence of the opposite conditions, namely: no marijuana particles or smell on the person or clothing, in circumstances where one might expect the clothing or person to smell of or exhibit marijuana particles, is probative, positive evidence of innocence. One of the "circumstances" is the (relatively) large amount of marijuana compared with the (relatively) short amount of time available to off-load the marijuana, store it and scrub the 55 foot vessel with pine oil and have those aboard and ashore thoroughly wash and change their clothes. The Government's evidence showed few vessels in the general area and no connection between any of those vessels, so there were (at most) 8 people involved from approximately 5 or 6 P.M. to less than 11:30 P.M. Therefore, no reasonable jury could disregard such exculpatory evidence, from Government witnesses, which was uncontradicted.

Re: M/V FORTY, The Suarez/Glasser Test's Factors. – Here, the M/V FORTY was a 55 foot vessel. It had a separate crew compartment and had three persons aboard, including the apparent master (A. DesRoches).

Petitioners respectfully submit the length of the voyage was not proved. Many Latin American products are available in South Florida and port cities like New Orleans.

In contrast to the testimony that the "pine oil" smell was "fresh" (i.e., recent), the Government adduced no evidence that the microscopic marijuana particles were "fresh/recent." No wrappings (burlap, large plastic garbage bags, barrels, cartons, or crates) were aboard

the M/V FORTY. The supposed marijuana was not "revealed" to the senses of trained law enforcement agents either on the FORTY or at Roan Lane where they were "physically on top of it"; since the contraband was not apparent to skilled police, it must not have been "revealed" to your Petitioners. Thus, there is no evidentiary support for actual, constructive or implied knowledge or notice of contraband by your Petitioners.

The Government evidence of "pine oil smell" might be argued to be an effort at "concealment," but when and by whom is left to the imagination in view of Government evidence of many possible dockages. The Government adduced no evidence that "pine oil" was present upon the bodies or clothing of any aboard the M/V FORTY or on Petitioners.

Re: The Robalo Vessel, The Suarez/Glasser Test's Factors. —Here, the unnamed Robalo vessel was a 23-foot center-console, open vessel powered by one (1), one hundred seventy-five (175) horsepower outboard engine. It is a typical, small, trailerable fishing/short-cruising vessel; the 5th Circuit called it a "speed boat," but it is not. It is unlike the "Cigarette"-type *racing* pleasure craft involved in *Tilton*. Moreover, evidence occurring *after* Petitioners' arrests (particularly any co-conspirator admissions) are not in furtherance of any conspiracy as to them because their alleged affiliation with a conspiracy terminates as a matter of law upon each one's arrest.

The Robalo is small, not suited as a "load" vessel, so arguably, it could only be used as a "lighter" for a small number of marijuana bales or "pilot" vessel. However, there is no evidence that it was so used. The Robalo contained *no* marijuana and no pine oil at all

(not even microscopic particles), *Maślanka.* The Robalo had no marijuana wrappings or containers (no burlap, large plastic bags, barrels, cartons, or crates). The Robalo was not on a "list" of watched vessels, and was not wallowing with a heavy load, all important factors, per *U.S. v. Kleinschmidt,* 596 F.2d 133 (5th Cir. 1979) (reh. and reh. en banc denied). It was not "shrimping out of season," *D'Antignac.*

Thus, the supposed marijuana was not "revealed" to the senses of trained law enforcement agents and therefore must have been "not revealed" to Petitioners. Likewise, there was no marijuana or pine oil "residue" on the Robalo, the boat trailer, the "crew" of the Robalo, the truck pulling the trailered vessel, or the driver of that truck, or the rental cars at the Ramada or your Petitioners. The Roan Lane premises had been carefully watched by law enforcement personnel, but they observed nothing untoward. Evidentiary support for the Government's theory that the Robalo rendezvoused with the M/V Forty at Roan Lane is lacking. The absence of all the potential tell-tale signs under circumstances where they should have been present and with insufficient time and equipment to remove the signs are exculpatory facts that no reasonable-minded jury could have ignored; compare: *U.S. v. Weinreich,* 586 F.2d 481, 492 (5th Cir. 1978; reh. den. 1979), where a rendezvous furnished probable cause for an arrest.

In other words, conspiracies to import and conspiracies to distribute marijuana (and therefore aiding and abetting efforts to commit those substantive charges), although having different elements [the object sought to be accomplished], are typically inconsistent with one another, and therefore, the jury verdicts which found

Petitioners guilty of all such charges were here inconsistent, and so illogical that no reasonable jury could have returned those verdicts because of aforesaid legal inconsistencies and the aforementioned wealth of exculpatory evidence showing lack of *prior* guilty knowledge.

CONCLUSION

Your Petitioners respectfully submit that gross violations of the Constitution occurred as to the warrantless detentions and arrests of persons and vessels, and that grossly excessive warrantless searches and seizures of documents and tangible items occurred, all stemming from a wholly unsubstantiated "tip" given by persons or persons unknown at times unknown. Your Petitioners had standing to assert these violations. Despite the rule that the Government bears the burden of proof in suppression hearings where Constitutional violations are alleged and a prima facie showing is set forth in suppression motions, nevertheless those items were not suppressed by the trial court and the 5th Circuit did not correct that shortcoming on appeal. That evidence was admitted over objection, and formed the basis for the jury's conviction, the trial court's denial of post-trial relief, and the appellate court's affirmance of the trial court convictions and sentences; thus, there was no "harmless error" beyond a reasonable doubt. Therefore, the convictions and sentences rest upon fatally defective foundations: first, the charges (under the case law) are inconsistent because importation conspiracies are different from distribution conspiracies, and the trial evidence consisted of key items which should have been suppressed as violating 4th, 5th, 6th and 14th Amendment rights, so that under the 5th Amendment there was no basis for upholding the several convictions. On more specific notes, "consent" in custody under a warrantless arrest without probable cause cannot be knowing and voluntary, and was not here, particularly where the reviewing courts did not make the careful weighing of factors and analyses of causal connection between the illegal arrest and the supposed

"consent," *Bumpers. Villamontes* ought not to be extended beyond its specific facts (foreign flag vessel, anchored in a busy ship channel posing an immediate actual or potential hazard to navigation, detention of vessel by U.S. Coast Guard, vessel on water having immediate access to the high seas), and not extended here to a U.S. flag vessel, underway in a domestic lake, posing no actual or potential hazard to navigation, detention by local police, domestic lake not having immediate access to the high seas because of several drawbridges and relatively narrow "passes".

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed to the Office of the Solicitor General, and the Office of the U.S. Attorney for the Eastern District of Louisiana, this September 29, 1984, and will be mailed to other counsel on September 29 or 30.

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